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THE

HISTORY

OF THE

LAW OF ARREST

IN PERSONAL ACTIONS;

SHOWING ITS SEVERITY AND INEXPEDIENCY, AND THE MISCHIEFS INCIDENT TO THE SYSTEM OF

BAIL,

WITH

Practical Amendments.

By P. W. CROWTHER, Esq.

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THE

LAW OF ARREST,

&c. &c.

THE following brief History of the Law of Arrest and Bail is offered to the public as intimately connected with the present deliberations of the House of Commons; and the subject so deeply affects the interests of the community, that it merits the attention of every benevolent man.

By the common law, which is a law of mercy resulting from the sense and feelings of mankind, as moulded by the influence of Christianity, a person is not liable to be arrested, or even after verdict to be taken in execution, for any civil cause unaccompanied with force, called, *vi et armis* (*a*).

So careful were our Saxon ancestors to protect the liberty of the subject, that any injury to the personal estate was only to be recompensed out of the offender's goods and chattels, and the issues, rents, and profits of his lands. To guard against

(*a*) Co. Lit. L. 3. c. 8. s. 504.

groundless and vexatious suits, a plaintiff, before he could compel a defendant to answer, was required to give to the sheriff real and substantial pledges to prosecute his suit. On pledges being given, the sheriff summoned the defendant to appear, and if he made default, an attachment issued against his chattels, to enforce an appearance. To this end repeated writs of distringas (*b*) issued against his goods, and the profits of his lands; if a defendant had no substance whereby he could be attached, he was considered incapable of making satisfaction to the plaintiff, and the suit, therefore, terminated. In cases of trespass, deceit (*c*), and conspiracy, *vi et armis*, or of injuries against the peace, the defendant was not entitled to be personally summoned; but he might, in the first instance, be attached by his chattels, and if he had no goods, he might be arrested by a *capias ad respondendum* (*d*), which is a judicial writ directing the sheriff to arrest and safely keep the defendant, so that he may have his body in court at the return of the writ, to answer the plaintiff's action.

(*b*) The process of summons and distress infinite is used to compel the appearance of peers, members of parliament, and corporations, for no *capias* lies against these.

(*c*) A writ which lieth "where one man doth any thing in "the name of another, by which the other is damnified and de-"ceived." Fitz. Nat. Brev. 217. The modern practice is to bring an action on the case in the nature of a writ of deceit.

(*d*) 3 Rep. 12.

The process in an action of account was by distress infinite, until, by the statute of Marlborough(*e*), a *capias* to arrest the person in this action was allowed against bailiffs, who withdrew and had no land whereby they might be distrained. "This statute extended not only to bailiffs ac- "cording to the letter, but to guardians in socage, "receivers, and other accountants."(*f*)

By the 13 Edward 1. st. 1. c. xi., "Con- "cerning servants, bailiffs, chamberlains, and all "manner of receivers, who were bound to yield ac- "count; it was agreed and ordained, that when "the masters of such servants did assign auditors "to take their accounts, and they were found in "arrearages upon the account, all things allowed, "which ought to be allowed, their bodies should "be arrested, and, by the testimony of the audi- "tors of the same account, should be sent or de- "livered unto the next gaol of the king in those "parts, and should be received by the sheriff or "gaoler, and imprisoned in irons in the said cus- "tody, and should remain in the same prison "until they had satisfied their masters fully of the "arrearages; nevertheless, if any person so com- "mitted to prison complained that the auditors of "his account had grieved him unjustly, charging "him with receipts which he had not received, or "not allowing him expenses, or reasonable dis-

(*e*) 52 H. 3. c. 23. (An. 1267.) (*f*) 2 Inst. 143.

claims, and the state of the law of arrest aggravated the hardship of a defendant in custody; for the sheriff was not compellable to liberate him until he had sued out a writ *de homine replegiando*, commanding the sheriff to release him on his giving sureties or manucaptors, who undertook for his being forthcoming at the return of the writ of *capias*. Where a defendant did not sue out this writ, his liberty was at the absolute mercy of the sheriff, who exercised an arbitrary discretion in bailing prisoners, exacted large sums for showing ease and favour, and extorted undue security and considerable property on pretence of indemnity. "The sheriff, or other officer, for such favour, "would sometimes gain a piece of land, and was "never without good reward for such favour; and "so the sheriff and other officers, by such pillery "and pollery, were enriched, and were sure to "suffer no loss for the sum in which they should "be condemned for the escape." (*l*)

Before the plaintiff could declare, the defendant must have appeared in court; the sheriff on being called upon to return his writ, returned *cepi corpus*, in cases where he had thought fit to take bail; and if the defendant was not forthcoming, the plaintiff could not proceed in his action; to remedy this inconvenience, the courts determined that the

(*l*) *Dive* v. *Manyngham*, (An. 4. E. 6.) Plowden, p. 67.

sheriff, in not bringing in the defendant's body, according to the literal words of his return, was to be considered as guilty of a wilful contempt; and amerced him, from time to time, until he produced the defendant, assigned the bond to the plaintiff(*m*), or privately satisfied him. The sheriff, to relieve himself from these repeated amerciaments to the King, ultimately paid the debt and costs, which were in general amply reimbursed by the security or property he had wrested from the defendant. These and other exactions and oppressions of the sheriffs produced such a considerable emolument, that the office was often let out to farm.

To remedy these grievances the statute of 23 Hen. 6. c. 9. ordained, "That no sheriff should "let to farm, in any manner, his county. That "no sheriffs or other officers and ministers, by "occasion or under colour of their office, should "take any other thing by them, nor by any other "person, to their use, profit, or avail, of any per-"son by them, or any of them, to be arrested or "attached, nor of none other for them, for the "committing of any arrest or attachment to be "made by their body, or of any person by them, "or any of them, by force or colour of their office "arrested or attached for fine, fee, suit of prison, "mainprize, letting to bail, or shewing any ease

(*m*) 2 Mod. 84.

"or favour to any such person so arrested, or to "be arrested, for their reward or profit, but such "as follow,—that is to say, for the sheriff, 20*d.*; "the bailiff, which maketh the arrest or attach- "ment, 4*d.*; and the gaoler, if the prisoner be "committed to his ward, 4*d.*; and should let out "of prison all manner of persons by them or any "of them, arrested or being in their custody by "force of any writ, bill, or warrant, in any action "personal, or by cause of indictment of trespass(*n*), "upon reasonable sureties of sufficient persons "having sufficient within the counties where such "persons were so let to bail or mainprize, to keep "their days in such place as the said writs, bills, "or warrants, should require such person or per- "sons, which were or should be in their ward by "condemnation, execution, *capias utlagat* (*o*), or

(*n*) Anciently felonies were bailable by the sheriff, before actual conviction, *quia carcer est mala mansio*. The sheriff's power of so bailing was abolished by 3 Ed. 1. c. 15. 6 Ed. 1. c. 9. 28 Edw. 3. c. 9. Stat. Westminster, 1 R. 3. c. 3. 3 H. 7. c. 3. 2 Inst. vol. 2. p. 185. c. 15. 2 H. Black. 418.

(*o*) But now by 4 & 5 Will. & Mary, ch. 18, sec. 4 & 5. if the defendant is taken on this writ, where special bail is not required, the sheriff may accept an attorney's undertaking to appear for the defendant, and reverse the outlawry; and where special bail is required, he may take a bail bond for defendant's appearance, by attorney, to reverse the outlawry; and in either case the defendant may be discharged out of custody.

" excommunication (*p*) ; surety of the peace " and all such persons which were or should be " committed to ward by special commandment of " any justice, and vagabonds refusing to serve " according to the form of the statute (of labourers " only except) ; and that no sheriff, nor any of the " officers or ministers aforesaid, should take or " cause to be taken, or make any obligation for " any cause aforesaid, or by colour of their office, " but only to themselves of any person, or by any " person which should be in their ward by the " course of the law, but by the name of their " office and upon condition written, that the said " prisoners should appear at the day contained in " the said writ, bill, or warrant, and in such places " as the said writs, bills, or warrants should re- " quire ; and if any of the said sheriffs, or other " officers, or ministers aforesaid, should take any " obligation in other form by colour of their offices, " it should be void, and that he should take no

(*p*) By 53 Geo. 3. c. 126, the power of excommunication is to be discontinued (except in definitive sentences,) and in lieu thereof the ecclesiastical courts shall pronounce parties contumacious and in contempt; and the Court of Chancery shall thereupon issue a writ *de contumace capiendo*, to have the like force as the writ *de excommunicato capiendo*, and the party arrested by the writ *de contumace capiendo*, shall remain in custody until the sheriff receives a writ of deliverance from the Ecclesiastical Court.

"more for the making of any such obligation, "warrant, or precept, but 4*d.* (*q*).

(*q*) The old fees given by this Act have long become so obviously inadequate to the fair remuneration of the sheriffs and their bailiffs, that the courts of law have not only silently permitted their officers to allow, on the taxation of the suitor's costs, reasonable sums paid to the sheriffs and bailiffs, very far exceeding the fees allowed by the 23 Hen. 6; but the Court of Common Pleas, in the year 1805, solemnly pronounced "that "the regulations of the statute, Hen. 6, could not now be "considered as giving the rule for the amount of the fees to be "taken, and that it was incumbent on the plaintiff to give some "evidence that more had been taken than by law was allowed," *Martin* v. *Slade*, Bosanquet and Puller's New Report, vol. 2, p. 59. This was an action against a sheriff's officer, for taking one guinea for an arrest, besides one guinea for the bail-bond; indeed, so general has been the adoption of a different rate of fees, that, in the years 1767, the justices of the peace for Lancaster, in session, made a table of fees (on the presumption they had power under 32 Geo. 2. c. 28), by which bailiffs were authorized to demand fees, in proportion to the sums for which the arrest was made, viz. in debts from 200*l.* to 500*l.*, 2*l.* for each arrest; the Court of King's Bench, however, in 1789 (in the case of *Boldero* and others v. *Mosse* and others, 3 Term Reports, p. 417), denied the validity of this order, on the ground that the justices were not authorized to fix fees for the Court of King's Bench; and the master, on the taxation of costs, only allowed the usual charge made in other counties, which was in general one guinea for each arrest. In the same court, on the 11th of May, 1819, in a case where the sheriff of Hereford claimed a fee of 3*s.* 6*d.* for every warrant, when issued for an attorney residing out of his county, and 2*s.* 6*d.* when issued for an attorney residing within the county, and it appeared that such

"And if the said sheriffs should return, upon "any person, *cepi corpus* or *red didit se*, that they "should be chargeable to have the bodies of the "said parties, at the days of the returns of the "said writs, bills, or warrants, in such form as "they were before the making of this act."

The design of this last clause was, that the

fees had for many years usually been paid and allowed on the taxation of costs, the chief justice declared that "the court "did not feel itself at liberty to say that the usage which was "stated to have prevailed, was sufficient to have repealed an "act of parliament (23 Hen. 6. c. 9.); the charge in this case "might be reasonable, but it was contrary to law and could not "therefore be allowed." *Dew*, Esq. v. *Parsons*, Gent. 2d vol. Barnwell and Alderson's Reports, p. 562. Notwithstanding this decision, the practice of customary fees being allowed on the taxation of the costs continues uninterrupted; indeed, if it were otherwise, the sheriff must personally execute the business of his office, or pay very large sums to his under-sheriff and bailiffs for transacting it, the old statute fees being so inadequate a recompence. Sir Richard Phillips, one of the Sheriffs of London and Middlesex, published, in 1808, a Letter on the office; and, in reference to this act, he observes, "It is better, however, to "point out a low scale of rates, as a maximum for the guide of "the public, than to allow the officer to charge in his discretion, "and subject the parties to other inconveniences, if they will "not pay what his discretion may think it proper to exact. Some "interference of the legislature is obviously necessary. It is "ridiculous, under the circumstances of the alteration in the "relative value of money and labour, to expect a duty to be "performed for a fee established near four hundred years ago! "The unreasonableness of such an expectation justifies, in a

sheriff might be amerced to the King, for not having the body at the day; but no action would lie against him at the suit of the plaintiff, if the defendant was not forthcoming, because the statute made it imperative on the sheriff to discharge the defendant on sufficient bail; and therefore he should not be subject to an action for doing his duty in obedience to the law(*r*).

As no persons were liable to be arrested except in actions of trespass, *vi et armis*, debt, detinue, accompt, or on a statute, Merchant or Staple, the number of arrests was comparatively limited until 19 Henry 7. c. 9. ordained, "that the like process "be had thereafter in actions upon the case, in the

"certain degree, the discretional claims of the officer," p. 186. The sheriff, therefore, adjusted the bail-bond fees, and prescribed the following table for the guidance of his officers.

"Fees for the bail-bond, according to the following rates, ap-"pear to have been sanctioned by time and custom, viz.

	£		£	£	s	d
"For amounts under	25		—	0	10	6
from	25	to	50	0	15	0
	50	to	100	1	1	0
	100	to	150	1	11	6
	150	to	300	2	2	0
	300	to	500	3	3	0

"Exclusive of the stamp duty marked on the bond." And, in 1812, this table was recognized by the sheriff of Middlesex, and ordered to be put up in two or more conspicuous places in every lock-up house.

(*r*) 2 Mod. 177. 2 Saunders, 59.

"courts of King's Bench and Common Pleas, as "in actions of trespass or debt."

By 23 Henry 8. c. 14. the same process was given in every action for forcible entry into lands as in actions of trespass at the common law, and it was directed that "like process be had in every "writ of annuity and covenant as in an action of "debt."

By 21 James 1. c. 4. the same process was extended to informations on penal statutes "as in "actions of trespass, *vi et armis*, at the common "law."

Although the statute of 23 Henry 6. c. 9. declares that the sheriff shall take "reasonable "sureties" from persons arrested, the amount of the security was not in many instances settled till 18 Charles 2. statute 2. c. 2. s. 2. declared "that in all cases where the certainty and true "cause of action were not expressed in the writ, "the defendant should not be required to give "security in any penalty beyond 40*l.*"(s) By 12

(s) It has been decided that the sheriff is not authorised, by 23 Henry 6. c. 9. to bail a defendant in custody, on an attachment for non-payment of costs, which is considered as in the nature of an execution.—*Phelips, esq.* v. *Barrett*, 4 Price's Rep. 23. And although the sheriff may, if he pleases, take bail on an attachment out of Chancery for non-payment of money, or for want of appearance or answer, yet he is not compellable so to do. 2 B. and A. 56.—6 Taunton's Rep. 569. When the sheriff

Geo. 1. c. 29. the sheriff shall take bail for no more than the sum indorsed upon the writ. Subsequent statutes(*t*) have provided that no defendant shall be arrested unless the original cause of action amounts to 20*l.*; and an affidavit is made thereof. In Wales and the Counties Palatine no arrest can be made on process out of the courts at Westminster, for a less sum than 50*l.* (*u*)

To mitigate the severity of the law of arrest, the 43 Geo. 3. c. 46. s. 2. allows the defendant upon his arrest, instead of giving bail, to deposit with the sheriff the sum sworn to, and 10*l.* for costs, and also such further sum as shall have been paid for the King's fine upon any original writ; and 7 and 8 Geo. 4. c. 71. permits a defendant, instead of perfecting bail, to allow such deposit, together with an additional sum of 10*l.* as a further security for the costs of the action, to remain in court to abide the event of the suit. If bail has been given to the sheriff, the defendant may make such payment into court, in lieu of putting in and perfecting bail, and may receive such deposit on perfecting bail any time before judgment.

thinks fit to take a bail-bond in these cases, the penalty must not exceed 40*l.*— *Birdwood* v. *M. Hart and another*, 6 Price's Rep. 32.

(*t*) 5 Geo. 2. c. 27. 21 Geo. 2. c. 3. 19 Geo. 3. c. 70.— 51 Geo. 3. c. 124. s. 1. 7 and 8 Geo. 4. c. 71.

(*u*) 7 & 8 Geo. iv. c. 71. s. 7.

The 32 George 2. c. 38. with the design of allowing a defendant time to procure bail from his friends, declared, "that no sheriff's officer "should upon arrest carry any person to any gaol "or prison within twenty-four hours from the "time of arrest, unless the person should refuse "to be carried to some safe and convenient dwell-"ing-house of his own nomination," but a defendant rarely insists on the provisions of this act; being unwilling to exhibit himself as a prisoner at his friend's house, or to introduce a sheriff's officer as an inmate. Indeed the provisions of this act could not be generally used without such a large and mischievous increase of sheriff's officers, as would allow of one being in attendance on each defendant twenty-four hours; and in many cases the necessary security against escapes would require the attendance of two officers.

The sheriff's responsibility from the default of the defendant and the insufficiency of bail, was formerly comparatively light; for during the feudal state, arts and commerce being neglected, land constituted the chief property, and real actions the principal suits. In proportion as the nation advanced in wealth, new relations of society were created, and the preservation of these occasioned frequent appeals to law. Whilst land formed the principal property, it was easy for the sheriff to

take only such bail as were both sufficient at the time and likely to continue solvent: they were not then subject to the numerous causes of unforeseen failure and insolvency, which are incident to this commercial age. If the sheriff or his officer, after using due diligence in inquiring into the sufficiency of the proposed bail, learns that they are householders or freeholders of reputed property, he is compellable immediately to take such bail and discharge the defendant. If he refuses sufficient bail, he is liable to an action on the case(*s*); yet if, at the return of the writ, the bail do not procure bail above to be put in and justified, or cause the defendant to be surrendered, an attachment issues against the sheriff for not producing the defendant according to the literal form of the return, *cepi corpus*, which the statute, 23 Henry 6, compels him to observe(*t*). The law first throws a responsible and odious duty on the sheriff or his officers, and afterwards, even when this duty has been most honorably executed, the sheriff is liable to the severe measure of the criminal process of attachment(*u*). The ancient method of amercing

(*s*) 2 Sid. 22. Cro. Car. 196. 2 Mod. 31. 5 Maule and Selwyn's Rep. 223.

(*t*) *Parker* v. *Welby*, 2 Keb. 657. Siderfin, 22. 2 H. Black. 434.

(*u*) *Bland* v. *Levit*, Raym. 193. Cro. Eliz. 852.

the sheriff was more beneficial and just, "because "as the sheriff was bound to bail the party, if he "was mistaken in his sureties, he was not to suffer "in his liberty; it might not be in his power to "bring in the body which he was obliged to bail." "If he had not the body, he should be amerced "till he had him or assigned the bail-bond to the "plaintiff(*x*)," and the old method allowed the sheriff time to surrender him, or to be indemnified from the amerciaments, by enforcing the bail-bond(*y*); but by the modern summary and harsh method of attachment(*z*), which issues without allowing the sheriff to show any cause against it, the sheriff can now only avoid being committed to close prison for a feigned contempt(*a*), by immediately paying the plaintiff's whole debt and costs(*b*). On doing

(*x*) *Bland* v. *Levit.* Raym. 193. Bac. Ab. 205. Cro. Eliz. 852. 1 Vent. 55. 3 Salk. 314. 12 Mod. 579.

(*y*) *Smith* v. *Norton*, 1 Barnard, 246.

(*z*) "The practice of amercing the sheriff appears to have "continued from the earliest time down to the beginning of the "reign of George 2, and to have given way to the proceeding by "attachment at some period between the years 1722 and 1729." In note to *Beecough* v. *Rossiter*, in Error, 2 H. Black. p. 434. "If the sheriff be once in contempt for not bringing in the defend-"ant's body, the contempt is not purged by the defendant's sur-"rendering afterwards, though before an attachment is moved "for against the sheriff."—8 T. R. 29.

(*a*) *Fowlds* v. *Mackintosh*, 1 H. Black. 233.

(*b*) On a rule to show cause why an attachment should not

this, the sheriff seeks to be reimbursed by the officer who made the arrest or took a bail-bond; and the officer, if he has taken a bail-bond, commences an action, in the sheriff's name, against the defendant and his bail, who cannot be arrested in this action; and the recovery of the sum paid on the attachment is always uncertain and remote. If the officer was tempted, as he frequently is, to discharge the defendant without a bail-bond, he has no mode of reimbursement(*c*).

Common justice would have dictated, that where the sheriff faithfully performed his compulsory duty of accepting sufficient bail, he should, to the ancient form of return *cepi corpus*, have been allowed to add the truth, "and pursuant to the statute I de-"livered him out to bail upon the obligation of "A. B. and C. D., persons having sufficient within "my bailiwick, which obligation I have ready to

issue against the sheriff, for neglecting to take a replevin bond, it was observed, "that such an attachment had never been granted "because the party injured might maintain an action against the "sheriff, and that this could not by any means be construed to be "an abuse of the process of the court, as a contempt which was the "sole ground for an attachment; and the court being of that "opinion discharged the rule." *The King* v. *Lewis*, 2 T. R. 617. (an. 1788.)

(*c*) *Brander and another* v. *Robson*, 6 T. R. 336. *Mellish and another* v. *Petherick*, 8 T. R. 450. *Rogers* v. *Reeves*, 1 T. R. 418.

"assign to the plaintiff." In one action for a false return (*d*), where the sheriff had taken a bond and returned *cepi*, but the defendant was not forthcoming, it was held that the sheriff was not obliged by the statute to return only a *cepi corpus et paratum habeo*, but might return that he took bail; for the statute provides, that if he return a *cepi corpus*, he shall be chargeable as before; but doth not enjoin him to make such a return (*e*). On such special

(*d*) *Page* v. *Tulse and others*, (28 Car. 2.) 2 Mod. 83.

(*e*) By 43 Geo. 3. c. 46. and 7 and 8 Geo. 4. c. 71. a defendant may on the arrest deposit with the sheriff the debt sworn to, and 10*l.* for costs, in lieu of giving bail; and in cases where the sheriff has received such sum, and is ruled to return the writ, he gives the following answer:—

"I took the within-named A. B., whose body I safely kept "until he paid into my hands, in lieu of bail, £ , the sum "indorsed, for bail, and £10. for costs; and thereupon I dis- "charged the said A. B. pursuant to the statute, which money I "have paid into court."

The answer of C. D. Esq. Sheriff of

And why should not the sheriff, in cases where he has taken a bail-bond pursuant to the statute 23 H. 6., be at liberty to make a similar return? To prevent the sheriff or his officer from negligently taking insufficient bail, he should be liable to an action by the plaintiff to recover damages for his neglect, as in replevin; but if the sheriff could prove that the bail were sufficient at the time he accepted them, he should not be held responsible for their subsequent insolvency. Yet, on a motion to discharge the proceedings against the sheriff, upon circumstances that the bail were good when the defendant was arrested, and the sheriff was

return, if the defendant had failed to appear, the court, instead of amercing the sheriff upon the false assumption of his being guilty of a wilful contempt, should have left the plaintiff to his action on the bail-bond for the recovery of the debt and costs; but if the bail could be proved to have been insufficient at the time the sheriff accepted them, he should have been liable to an action on the case for taking insufficient bail. (*f*) Yet it is now held, that the sheriff cannot specially return that he has duly bailed the defendant; "and let the bail "taken by the sheriff be ever so good, yet the "plaintiff may refuse an assignment of it, and pro- "ceed against the sheriff by amerciaments; there- "fore it behoves him to take good bail. It is true "that the sheriff shall not be brought into contempt "for not bringing in the body; but the only way "is to amerce him, and the sheriff may proceed "on the bail-bond; and the plaintiff, by 23 *H.* 6. "c. 9. has an election of bail or amerciament." (*g*)

obliged to take bail under the statute 23 H. 6. c. 9. and these bail had since become insufficient, the court denied the motion. —*Champion* v. *Townshend*, (12 Geo. 2.) Barnes, 8.

(*f*) Pickering's case, 12 Mod. 447. An. 1701. 1b. Cases, W. 3. 447.

(*g*) As, in taking insufficient sureties on a replevin bond under 3 Ed. 1. c. 2. Westm. 2. c. 2. 11 Geo. 2. c. 19. s. 23. Vide Vin. Abr. vol. 16. 400. 2 T. R. 617. 4 T. R. 443. 2 H. Black. 36. 547. Buller's N. P. 60.

The object of the statute of 23 Henry 6. c. 9(*h*), was not to give a plaintiff a new and further security for his debt, but to relieve the defendant from the arbitrary discretion of the sheriff in taking or refusing bail, and thereby extorting large sums and securities for ease and favour; but the courts have so lost sight of the true design of the statute, that they have given the plaintiff an increased security for his debt, at the expense of the sheriff, or his officer and the bail. By this summary mode of attachment, the sheriff or his officer is made chargeable for the default of the defendant and his bail; and though they were persons of notorious property and substance at the time they became bail, and as such he could not lawfully refuse them; yet if they afterwards become insolvent (*i*), he is

(*h*) *Ellis* v. *Yarborough*, 2 Mod. 177. *Allen* v. *Robinson*, Sid. 22. *Wolfe* v. *Collingwood*, 1 Wils. Rep. 262.

(*i*) "The sheriff is not bound to warrant the sufficiency of "the pledges in a replevin bond; if they are apparently respon- "sible, it is sufficient." The Chief Justice observed, "I can- "not think the statute (11 Geo. 2. c. 19. s. 23.) meant to throw "on the sheriff this onus. Suppose the sheriff had taken an "eminent banker as surety a week before his bankruptcy, when "no one in the world had the slightest reason to suspect his "circumstances: according to the same doctrine (the subsequent "responsibility of the sheriff,) he would have been liable for "taking him as surety."

Heath, Justice.—"The mischief before the statute was, that "the sheriffs used to accept mere men of straw for sureties. But

deprived of all means of recovering the sum he has paid on the attachment; thus it is that an unfair and weighty responsibility is cast on him, or rather on his officers or bailiffs who indemnify him. These bailiffs, in order to meet their frequent liabilities, are as it were compelled to exact large sums from persons arrested; and whilst the law of arrest and bail remains unaltered, the high sheriff must connive at the most illegal practices, or pay out of his own pocket the great losses thus unfairly made incident to his office. The statutes are already filled with penalties against sheriff's officers for misconduct, yet all experience proves, that whenever laws work gross injustice on public officers, they are necessarily forced to violate their strict duty to obtain reasonable indemnity or compensation. It has become a common practice for a creditor, when he finds that his debtor is in an insolvent state, to

" the sheriff cannot cast up the man's accounts to see the real " state of his property."

Dallas, Justice.—" The sheriff makes proper inquiries, and " finds that these are considered as responsible persons. Is not " this sufficient? It cannot be that the sheriff should be bound " to know that which nobody else knows; and if the rest of the " world would trust the surety, it is sufficient justification to the " sheriff if he also consider him as a responsible person."—*Hindle* v. *Blades and another*, 5 Taunton's Rep. 225.

Such obvious rules of justice should have been applied to bail-bonds.

arrest him in the hope of being able to fix the sheriff with the debt, and the courts have encouraged such unjust proceedings towards the sheriff, by deciding, "that if the defendant become bankrupt "after he has given a bail-bond, the bail are not "discharged unless he obtains his certificate before "the bond is forfeited—when he acquires it after-"wards, they remain liable to the same extent as "if the bankruptcy had not occurred." (*k*). And if a bankrupt does not obtain his certificate until after an action is commenced against him on the bail-bond, it is not discharged as against him, although the certificate extinguishes the original debt—the courts considering that the bankrupt's liability on the bond is a new and distinct cause of action (*l*).

If a defendant fails to appear at the return of the writ, the plaintiff has an option to proceed by attachment against the sheriff, or to bring an action against him for an escape; but because to such action the sheriff may plead that he took bail of persons having sufficient property at the time (*m*), the plaintiff almost always takes out an attach-

(*k*) *Sanders* v. *Spinks Barnes*, 105. *Wooley* v. *Cobbe*, 1 Burr. 241. *Cockerill* v. *Owrton*, ib. 436. *Clarke* v. *Hoppe*, 3 Taunt. 46. Petersdorff "On the Laws of Bail," pt. 1. c. 6. p. 237; et vide *Donnelly* v. *Dunn*, 2 B. and P. 45.

(*l*) 1 Burr. 436.

(*m*) Cro. Eliz. 624. 852. 2 Saund. 60. Sid. 22. 2 Mod. 177. 1 Mod. 33.

ment, and thus dexterously precludes the sheriff from showing that he has faithfully discharged his duty by taking good bail.

A debtor may be arrested on the affidavit of a creditor, or on the affidavit of his alleged competent agent (*n*), without a moment's warning—torn from his family and business, to the serious injury of his reputation and credit. The sheriffs and under-sheriffs, to relieve themselves from all responsibility, take large security from the officers, and then allow them to make their own terms with the defendant. Being thus constituted the sole judges of the sufficiency of the bail which the defendant tenders, the officer may exercise a mischievous power over his prisoner; he can with perfect safety frequently raise legal objections to the proposed bail (*o*); and where they are really unexceptionable, he may, by frivolous objections, work on the fears of the prisoner, till the impa-

(*n*) For "the statute does not require that the person who "makes the affidavit should be connected with the creditor in "any character, or that he should set it out if he be, or state his "means of knowing the facts. All that the statute requires is, "'that where the plaintiff's cause of action shall amount to the "'sum of £10. or upwards, an affidavit shall be made of such "'cause of action.' Under these words any man may make such "affidavit at his peril."—9 Price, 322. 1 Chit. 58.

(*o*) 10 Co. 101. *Lovell* v. *Plomer and another*, 15 East's Rep. 320. *Ireland* v. *Farebrother, Esq. and another*, Middx. N. P. reported in the Times, 18th Feb. 1828.

tience of confinement induces him to offer a gratuity for their immediate acceptance. All experience shows, that if the officer rigorously performed his duty in accepting none as bail but persons of unquestionable qualification and sufficiency, the law of arrest would be yet more galling and oppressive to the unfortunate debtor—in most cases protracted imprisonment would be his doom. The difficulty of defendants suddenly to procure bail, unexceptionable in all points, is incontestably proved by the very few instances in which the plaintiff accepts from the sheriff an assignment of the bail-bond, (4 and 5 Anne, c. 6. s. 23,) instead of proceeding by attachment. If the defendant's station in life enables him to refer the officer to a respectable attorney, who will engage for his appearance, or that bail shall be put in and justified, an illegal gratuity is paid to the officer for the favour of liberating the defendant without a bail-bond; but there are comparatively few cases where a defendant can give such a reference; and if he is prevented from offering bail, either by his circumstances, or by a reluctance to expose his distress to his friends and neighbours, he willingly gives a large bribe to the officer for letting him out of custody, on his word to be forthcoming. In this case, as where the officer accepts the undertaking of the defendant's attorney, he incurs an immense responsibility; for, if the defendant is not forth-

coming, or bail above justified, the officer must eventually pay the plaintiff's whole debt and costs; and having violated his duty (*p*) by not taking the only legal security, a bail-bond, he can maintain no action against the attorney or the defendant, to recover the sum he has paid by their breach of faith (*q*). To remunerate the officer for this great risk, he demands, not unreasonably, a gratuity like a premium of insurance proportioned to the hazard; and it must be admitted, that a large portion of the popular odium against sheriff's officers might with justice be directed against the law of arrest, which necessarily causes many grievous excesses. And here it may be observed, as a further argument for the necessity of an alteration of the law of arrest, that wherever laws are inconsistent with the spirit and institutions of the age, they either become inoperative, or to be used only as engines of oppression.

If the sheriff's officer wantonly refuses to consider the proposed bail as sufficient, the defendant must remain in prison, and his only chance of redress for such oppression, is to bring an action on

(*p*) 10 Co. 102. *Stevenson* v. *Cameron*, 8 T. R. 28. *Pitcher* v. *Bailey*, 8 East's Rep. 191. 4 Ib. 568.

(*q*) But where the officer discharges the defendant on his attorney's engagement to put in bail above, made with the consent of the plaintiff's attorney, the court will compel the defendant's attorney to perform his promise. 1 Durnf. & East, 418.

the case against the sheriff, for refusing sufficient bail. This action is nominally against the sheriff, but in reality against the officer who indemnifies him. There is little probability of a poor defendant being able to prosecute such action with effect, neither will a richer one adopt proceedings which will publish his arrest to the world. Thus it is, that the prisoner's liberty is too much in the power of the officer; the necessitous condition of a large proportion of persons arrested, is shown by their inability to deposit with the sheriff the debt and 10*l.* for costs, in lieu of giving bail; the provisions of this act (43 Geo. 3, c. 46. s. 5). are scarcely ever resorted to. As respects a *bonâ fide* creditor, he has only to make an affidavit of debt, and he may gratify his harsh feelings towards a debtor, who, although possessing the most ample means of satisfying the debt, may not only have his character and credit, but his freedom thus put in jeopardy.

The case of a debtor on a disputed account is yet more severe; he may in like manner be suddenly snatched from his family and business, and is not allowed, by a counter affidavit (*r*) of the merits, to show the real state of the account; he may be arrested for 1000*l.*, though upon the trial, and fair adjustment of the account, he may be found in-

(*r*) *Imlay* v. *Ellefsen*, 2 East, 453. 1 Salk. 100.

debted only 100*l.*, a sum for which he might have procured bail, and been restored to liberty—and what compensation does he receive for his imprisonment?—the costs of suit! (43 Geo. 3. c. 46,) for a plaintiff may, without subjecting himself to an action for maliciously arresting the defendant, arrest him for a much larger sum than is eventually found due, *Wilkinson* v. *Mowbray*, cited in 1 Campb. Rep. 297. (*x*)

If the law of arrest operates with cruelty in this case, it is yet more oppressive, where there is no real debt (*y*). By a man's making or procuring a

(*x*) Sed vide *James* v. *Francis*, 5 Price's Rep. 1. 2 Campb. Rep. 594.

(*y*) To guard against a commission of bankrupt being vexatiously issued, the 6 Geo. 4. ch. 16. sec. 13. requires that the petitioning creditor shall make an affidavit of his debt, and shall likewise give a bond to the Lord Chancellor, in the penalty of 200*l.*, to be conditioned for proving his or their debt or debts; and also for proving the party to have committed an act of bankruptcy, "and if such debt shall not be really due, or if there "shall be no proof of an act of bankruptcy, and it shall also ap-"pear that such commission was taken out fraudulently or mali-"ciously, the Lord Chancellor may award satisfaction to the "party against whom the commission was issued, and assign the "bond to him for the better recovering of damages." And why should not a plaintiff, before being allowed to hold a defendant to bail, be required to give security against his failing to establish his claim to the sum for which he arrests, if the judge should, on the trial, certify the defendant had been vexatiously sued for an undue sum? If the eventual amount of the debt is uncertain, why should the defendant be imprisoned on such uncertainty?

positive affidavit of debt, his fellow creature may instantly be arrested, without being allowed to disprove the demand by a counter affidavit, before a judge, on the ground that the merits of the claim are not to be entered into upon affidavit; but this appears to be a technical objection, highly injurious to equal justice between the parties. So severe is the law against a defendant, that, on producing an affidavit of the plaintiff's own confession, that the debt is not due (*z*), he is not entitled to be discharged. In one case, where a plaintiff, shortly before making the affidavit of debt, had by a letter stated that the defendant was a creditor of his, the court thought this case an exception to the general rule against going into the merits of the arrest upon affidavit, and interfered in a summary way to discharge the defendant out of custody, on affidavits denying the debt, the plaintiff not having denied his letter (*a*). It has been considered, that a man convicted of an infamous crime, though clearly disqualified from being a witness in any court, is competent to make the usual affidavit of debt in order to an arrest (*b*). To give yet further facility to vexatious arrests, an affidavit of debt made by a plaintiff residing abroad, is a sufficient foundation

(*z*) *Salter* v. *Shergold*, 3 T. R. 572.

(*a*) *Nizetich* v. *Banachich*, 5 B. & A. 904.

(*b*) *Davis* v. *Carter*, 2 Salk. 461. (8 W. 3.) *Horsley* v. *Somers*, Barnes, 116.

for a judge's order to hold a defendant to special bail; and although it is admitted that a party making a false affidavit abroad, cannot be indicted here for perjury, yet the courts justify the practice of arresting a defendant on such an irresponsible affidavit, because, "as far as the party is punishable at "all, he is punishable for a misdemeanour in pro- "curing the court to make an order to hold to bail by "means and upon the credit of a false and fraudu- "lent voucher of a fact produced and published by "him for that purpose (*c*)." A person may make an affidavit of debt, and forbear having it acted upon for nearly a year, so that he may leave a false affidavit with an attorney or agent in this country, and by not having it put in force until he has withdrawn beyond seas, he may escape suffering all the penalties of perjury; the unfortunate object of his malice may thus be immured in prison for months, and deprived of any compensation. An attorney may sue for a debt which he knows to be released, having been a witness to the release, without subjecting himself to an action for falsely and maliciously proceeding (*d*).

A plaintiff who knowingly swears to a false debt, and remains in England, may be punished for perjury; but, independent of the known difficulty of supporting an indictment for the offence,

(*c*) *O'Mealy* v. *Newell*, 8 East's T. R. 364.

(*d*) Mod. 209. 3 Wils. 379.

most defendant's cannot afford the expenses of a prosecution. Where a person falsely, maliciously, and without probable cause, arrests another, he is liable to an action; and where the plaintiff delays, discontinues his suit, or is nonsuited, the defendant is entitled to costs and damages at the discretion of the court (*e*). To support the action for maliciously holding to bail, the plaintiff must prove the existence of malice, either express or implied, as well as the absence of any probable cause (*f*), if he fails in any part of this proof, he will be nonsuited, and have to pay the costs. The difficulty of producing concurrent proof of malice and the want of probable cause(*g*), is sufficient to deter most men from bringing this action, although, if they recover damages under 40*s*., they are entitled to full costs. Evidence of arresting a person two months after the actual payment of the debt to an agent, is not sufficient to support the action (*h*); neither could this action be maintained where A. owed B. 23*l*., and had 10*l*. due to him, for which he arrested B., because A. "had not "not only a probable, but a real cause of action "against the plaintiff at the time of arrest; the "cross demands were separate and distinct; the

(*e*) 8 Eliz. c. 2.

(*f*) *Purcel* v. *M'Namara*, 1 Campb. 199.

(*g*) 2 B. & C. 693. 1 B. & P. 388.

(*h*) *Gibson Chaters*, 2 B. & P. 129. (an. 1800.)

"statute of set-off is not compulsary (*i*)." In 1822, the Court of King's Bench declared, "it is "an arrest without reasonable or probable cause; "if where the plaintiff knows that the defendant "has a set-off, reducing the balance below 15*l*. "(the sum for which a person was liable to be "arrested), he holds the defendant nevertheless to "bail for the whole amount." "What is a rea- "sonable and probable cause for arrest?—Is it not "obtaining security for that which is fairly due? "—now that must be the balance (*k*)."

The law of arrest is frequently converted to the worst purposes. Chief Justice Mansfield observed, "there never was a period when this spe- "cies of action (for vexatious arrest) ought more "to be encouraged, for there is much abuse made "of the power of arrest (*l*)."

It has been shown, that by the humane principles of the common law, no man could be imprisoned for debt; his property could alone be responsible for the performance of his civil contracts; and, with these principles, agree both the moral law of the Mosaical dispensation, and the law of Solon, that no man's body should answer

(*i*) *Brown* v. *Pigeon*, Campb. N. P. vol. 2. p. 594. (1811.) Vide *Wetherden* v. *Embden*, ib. vol. i. 295. (1808.) and *Park* v. *Langley*, 10 Mod. 145. 209. 2 Vin. Ab. 33.

(*k*) *Dronefield* v. *Archer*, 5 B. & A. 513.

(*l*) *Sinclair* v. *Eldred*, 4 Taunt. 10.

for his civil debts (*m*). The Roman law, as soon as it had been imbued with the spirit of Christianity, provided, that if a debtor surrendered his property to his creditors, he should be protected from imprisonment (*n*).

The arbitrary power, which is vested in a creditor, of suddenly imprisoning a debtor, before his liability has been established by a verdict, is opposed to the true interest of a commercial state and the dictates of benevolence. The law of arrest not only acts severely on the debtor, but in its consequences is injurious to the general interests of commerce; each man knowing that he is exposed to the power of arrest, at the caprice or pressing exigency of his own creditor, adopts the summary and powerful measure of arresting his debtor, who is thus forced to act in the same manner towards others, and extensive ruin ensues, especially in times of commercial panic. What is the language of the debtor to the demand of instant payment? Only give me time; I am not prepared for this sudden demand of payment; do not arrest me, and thereby destroy all my prospects. The effect of this imprisonment on the merchant or trader is the utter ruin of his credit and business. As relates to the professional man, it is fatal to

(*m*) Montesquieu Sp. Laws, B. 12. c. 21.
(*n*) Cod. 7—71. Inst. 4. 7. 40. Nov. 135. c. 1.

that fair reputation, which is necessary to his success in life. On all classes its effect is most demoralizing: take a view of the habits and morals of the inmates of the two great national prisons, the King's Bench and Fleet; and what does it exhibit (*o*)? For the most part, noisy mirth, licentious discourse, and open profaneness—habits of idleness and disorder, which become fatal to future industry and to that principle of self respect, which preserves the moral character of man; these habits soon stifle all the sensibilies of nature, and engender a hardy recklessness of character and flagrant contempt of the laws. To the poor but unfortunate debtor, confinement is, indeed, a cruel fate—he is cut off from all the sympathies of life, and debarred the means of honourable exertion to retrieve his fallen fortune—his innocent wife and children deprived of his fostering protection, are, for a while, left to struggle against poverty, until their weak efforts fail, when they are overwhelmed by want and numbered with the destitute. We all exclaim against the barbarity of those Asiatic laws which doom a debtor, his wife, and children, to sale and captivity; but the English laws are virtually little better, while they consign the debtor to prison, and his wife and children to grief and penury.

(*o*) See the Report of a Committee of the House of Commons in 1815, which depicts the most appalling miseries and disgusting excesses.

The poor and friendless prisoner remains in gaol, without even a gaol provision for bed, fuel, or clothing, and in these respects his condition is worse than the common felon's; "what pretence "can justify the depriving an innocent, though "unfortunate, man of his liberty, without the "least utility to his creditors (*p*)?"

The power of arrest is sometimes defended on the plea of its deterring persons from improperly contracting debts; but has it produced this result? Does it not rather encourage the tradesman to give undue and criminal credit? Does he not act thus, because he is, at all times, armed with this power of capriciously arresting his inexperienced or unsuspecting victim, of extorting undue security from him, injurious to the equal claim of other creditors, or of successfully working on the feelings of his family and friends? Take away this tremendous power of arrest, and credit will be confined to its legitimate bounds, the probable means of payment. The penal provisions of the bankrupt code are a protection to the commercial interests, against the dishonourable or fraudulent conduct of the trader; but if, on abolishing the law of arrest, it should be thought fit to provide further security against the misconduct of the debtor, it might be enacted that any persons who should be convicted

(*p*) Beccaria on Crimes, c. 34.

on indictment or information of having contracted debts or engagements fraudulently, or by means of any false pretence, reference, or certificate of character or credit, or without having had any reasonable or probable expectation, at the time when contracted, of paying or fulfilling any such debt or engagement, should be liable to be imprisoned, at the discretion of the court, any time not exceeding years; but let not the misfortune of a debtor be visited with the punishment which belongs to crime.

If the interests of society should prevent the abolition of the power of imprisonment before trial, humanity loudly demands some remediable measures.

By the present practice a debtor may suddenly be deprived of his liberty, not only without one tittle of proof of the alleged debt, but without a previous demand thereof (q), and his liberty is placed at the discretion and power of a sheriff's officer. The only legal security which the officer can receive, on liberating the defendant, is a bail-bond,

(q) In most of the countries of Europe the usual practice is, to have the person sued, summoned to appear before the court, by a public officer belonging to it, a week before hand; if no regard is paid to such summons, twice repeated, the plaintiff, or his attorney, is admitted to make, before the court, a formal reading of his demand, which is then granted to him, and he may prosecute execution. De Lolme, c. 10.

whereby two persons undertake, in a penalty double the amount of the debt sworn to, that the defendant shall duly appear at the return of the writ, to answer the plaintiff's demand; the two sureties are liable to the plaintiff's whole debt, without regard to the sum sworn to by him and costs, provided they do not exceed the penalty of the bail-bond (r); and they must, at the return of the writ, put in and justify bail above, or the defendant must be rendered into custody within four days (or, at farthest, before the usual time for justification has expired), if the action is in London or Middlesex, or within six days, if in any other county. After putting in bail, notice must be given to the plaintiff's attorney, and if he is dissatisfied with their sufficiency, he must except against them within twenty days; then the defendant, if in term time, within four days in London or Middlesex; in six days, if in any other county, must either procure the bail to justify, or add other bail who shall do so; if the bail are excepted to in the vacation, they must be justified the first day of the ensuing term.

If the bail originally put in intend to justify, they must give the plaintiff's attorney one day's notice; if the added bail intend to justify, they must give two days' notice.

(r) *Stevenson* v. *Cameron*, 8 T. R. 28.

The mode of justification is, for the bail personally to appear in the Bail Court at Westminster Hall, established by 57 Geo. 3. c. 11. before a judge; they are then opposed by counsel, and closely examined as to their qualification and sufficiency, which consist of being householders or freeholders worth double the sum sworn to (*s*), after payment of all their just debts; except, where the sum exceeds 1000*l*., it is sufficient for the bail to justify in 1000*l*., beyond the sum sworn to (*t*). If the judge is satisfied of their qualification, they enter into a recognizance, that if the defendant is condemned in the action, he shall pay the money, or render himself to prison, or they will do it for him.

If the bail fail to justify, and the defendant is not surrendered into custody within the time for justification, a peremptory attachment issues against the sheriff for the plaintiff's whole debt and costs, to the extent and penalty of the bond; and the sheriff looks to the officer who made the arrest for indemnity, and the officer proceeds against

(*s*) This sum was formerly considered "as the measure and "ground of the bail's undertaking;" and "it was affirmed that "there was a rule of court, that, where the plaintiff recovers a "greater sum than is laid in the action, the bail should not "be chargeable." *Genbaldo* v. *Gagnoni*, Mich. 3 An. B. R. 1 Salk. 102.

(*t*) R. Mich. T. 51 Geo. 3. 8 Price's Rep. 508.

the bail, in the sheriff's name, to obtain full reimbursement (*u*).

To remove the necessity of bail who reside above ten miles from London or Westminster, personally attending at a judge's chambers, to put in bail above, and afterwards at the bail court to justify themselves, the statute 4 and 5 William and Mary, c. 4. s. 1. authorises the judges to appoint commissioners, throughout England and Wales, to receive recognizances of bail, and transmit the same to the judge, with an affidavit of the due taking thereof, made by some credible person then present. That bail so put in may justify themselves by affidavit before a commissioner, who may examine them on oath touching the value of their respective estates.

A judge on the circuit may likewise receive bail above.

(*u*) If the sheriff is able to put the plaintiff in a situation whereby his suit has suffered no delay, the court will stay the proceedings by attachment on the sheriff's paying the costs; but if the sheriff is unable to place the plaintiff in such a situation, the court will only relieve the sheriff on his rendering the defendant or perfecting bail, and upon the terms of the attachment remaining in the Crown Office, as a security to the plaintiff, for whatever sum he may, on the trial, recover against the defendant. The sheriff rarely avails himself of these terms, because they subject him to pay the plaintiff whatever amount he obtains a verdict for, without any regard to the limited penalty of the bond, although to this extent only can the sheriff be reimbursed by the bail.

8 Geo. 3—By a rule of court, the bail-piece taken before a commissioner, within forty miles of London and Westminster, shall be transmitted to a judge within eight days after the caption thereof. If taken above forty miles from London or Westminster, it shall be transmitted within fifteen days.

The commissioners shall enter, in a book, the names of the bail of the defendant's attorney and the time of taking the recognizance.

The plaintiff's attorney may apply for such names, and if he thinks the bail are insufficient, he may except against them within twenty days after receiving notice of their recognizance being duly transmitted to a judge in town, and the defendant must either put in better bail, or those already put in must justify, by affidavit taken before such commissioner, or by an oath made in the bail court at Westminster. In anticipation of the bail being excepted to, an affidavit of their justification is usually sent with their recognizance.

By 43 Geo. 3. c. 46. s. 6. the defendant in custody, after the return of the writ may, in order to his discharge in vacation, put in and justify bail before a judge, on giving the plaintiff's attorney two day's notice of justification.

It should be remembered that the avowed object of requiring the defendant, on his arrest, to give bail to the sheriff, in lieu of remaining in custody, is to secure bail above being put in at the return

of the writ, to answer the plaintiff's demand, and the bail to the sheriff must at such time, in order to their own security, put in and justify bail above (so called in contradistinction to bail below or to the sheriff), or cause the defendant to be surrendered. The practice of giving bail to the sheriff, whilst it casts an unfair and weighty responsibility on him or his officer, as respects the present and future sufficiency of such bail, places the personal liberty of the defendant in the power of the bailiff who arrests, as he is allowed by the sheriff or under-sheriff to use his own discretion in taking bail or making terms with the defendant; and often deprives a defendant, who is suddenly thrown into confinement, from prevailing on his friends to become bail. The magnitude of these evils is notorious, and it appears that the only way to prevent the frequent and sometimes necessary irregularities of the officers, and the sufferings of the defendants, is to enact,—

That no person shall be liable to any arrest, unless the debt or original cause of action exceeds the sum of 50*l.* except on a bill of exchange or promissory note for 30*l.* or upwards.

To establish a court wherein two experienced barristers may preside every day (except Sunday), as commissioners, for the reception of bail in London and Westminster, or within ten miles thereof.

To provide that in all cases of debt or damages, exceeding the sum of 50*l.* where the plaintiff requires special bail, and the defendant resides or tarries in London or Westminster, or within ten miles thereof, he shall be personally served by a sheriff's officer with a copy of the writ, inscribed with a notice for him to appear, and put in and justify bail in such court, within four days after service of such writ, and to give the plaintiff's attorney two days' notice of the names and residence of bail; and at the expiration of such notice the plaintiff's attorney shall either accept such bail, or oppose their admission in like manner, as under the present justification of bail(*x*).

That in cases exceeding 1000*l.* it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to by the plaintiff, conformable to the present practice.

Where the defendant is served with such writ, above ten miles from London or Westminster, he shall, within six days, put in bail before a commissioner, and give four days' notice thereof to the plaintiff's attorney, who shall then either accept

(*x*) "In the Court of King's Bench it was formerly a rule, that "notice of bail ought to be delivered to the plaintiff's attorney "preparatory to its being put in, and he was required to attend "before a judge, and immediately to elect, to accept the bail as "competent persons, or at once oppose their admission."—R. M. 7 Jac. 1. K. B. Petersdorff on Bail, 292.

such bail, or oppose their admission before a commissioner. If a defendant duly appear, and fail to justify his bail, he shall be committed to custody, but be at liberty to put in and justify other bail, upon giving the like notice to plaintiff's attorney, any time before execution is issued against him.

If a defendant fail to justify his bail at the appointed time, or to surrender himself into custody, he may, on affidavit thereof and of his having been personally served with a copy of the writ, be taken in any part of England, Wales, or Scotland, as on an escape warrant, and be committed to prison without the privilege of giving any bail or having the benefit of the rules (*y*).

If a defendant, before justifying his bail, abscond from his usual place of abode, he may, in like manner, be committed on an affidavit being made of his having absconded.

That if the defendant fails to surrender or perfect bail in due time, the plaintiff may enter a common appearance, or file common bail, on an affidavit of the service of the writ, and proceed in the action.

That no person shall be liable to be arrested, without such previous service of process, except on an affidavit of debt, to be made before a judge

(*y*) This severe penalty of close imprisonment will sufficiently deter debtors from attempting to take advantage of the notice of action, by absconding.

or commissioner, who shall be empoweerd to examine such party, making the affidavit, as to the truth thereof (*z*), and, except on the affidavit of the plaintiff's attorney (*a*), that to the best of his belief the affidavit of debt is true, and that he is informed and believes that the debtor is about to leave the kingdom; and if the judge or commissioner shall be satisfied thereof, he shall grant his fiat or order for the defendant's being arrested without any such previous service of process.

In all actions of trover, detinue, covenant, trespass, *vi et armis*, and for personal wrongs, the plaintiff and his attorney, before the defendant shall be liable to be arrested, shall, in like manner, make a joint affidavit of the cause of action, and their belief that the defendant is likely to abscond;

(*z*) It was formerly held, that "if, upon examination before a "judge, one did not make out a good cause of action, common "bail should be ordered; and if, upon examination before a judge, "common bail was ordered, and the plaintiff did not there declare "that he would move the court, or give notice of such his inten- "tion to the defendant, the judge's rule should be final to him."— *Taylor* v. *Brudon*, Cases Wm. 3. 526.

(*a*) This will give a great protection to the defendant against a creditor's unjust or vexatious proceeding, and it is analogous to the civil law, which, "to prevent rash and litigious contention, "compelled a plaintiff to swear that he did not commence the suit "with intention to calumniate, but upon a thorough confidence that "he had a good cause; and, what is more, the advocates on both "sides were likewise compellable to take a similar oath."—Justinian's Institutes (by Harris), lib. 4. tit. 16. p. 350.

and on receiving such affidavit and due examination of the plaintiff's attorney, a judge may, if it appears to him that the damage is likely to exceed 50*l*. grant his fiat or order for the defendant's being arrested without such previous service of the writ.

That no person shall be held to special bail on an affidavit of debt made by a plaintiff residing abroad, except on the oath of his attorney that he believes the debt to be due; and except on the plaintiff's giving a bond, with two sureties to the defendant, in the amount of the sum for which the defendant is to be arrested, conditioned to make good to the defendant any costs or damages he may recover against the plaintiff, in an action for having been maliciously and without probable cause held to bail(*b*).

That in attachments issued out of the courts of equity, to compel an appearance, answer, or obedience, to any interlocutory order, a copy of such attachment shall be served on the party in contempt, with notice for him to appear, and cause two sufficient sureties to put in bail and justify themselves before such commissioner, within four days, if in London or Middlesex, or within ten miles thereof; if elsewhere, within six days after such service; and to give two days' notice of the

(*b*) At present such a plaintiff is required to give security only for costs.

names and residence of such bail to the plaintiff's attorney, if in London or Middlesex, or within ten miles; if elsewhere, four days' notice; and if, at the expiration of four days or six days, the bail do not justify, and the party in contempt fails to surrender, he shall, upon an affidavit of the due service of such attachment, and default of perfecting bail, be liable to be committed to close prison without the privilege of afterwards putting in bail or having the benefit of the rules: but if, at the time for justification, the bail are rejected, and the party in contempt thereupon surrenders, he may put in and perfect other bail at any time, on giving two days' notice to the plaintiff's attorney, if in London or Middlesex, or within ten miles thereof; or on four days' notice, if elsewhere.

If the sum for which bail is to be taken is not specified on the attachment, it shall be sufficient for the bail to justify in 40*l.*

That a party in contempt shall not be liable to be arrested on such attachment without such previous service, unless on an affidavit of the plaintiff and his solicitor that the party is about to abscond; and if he shall be thereupon arrested, he may put in and justify bail, in manner aforesaid, at any time.

That in outlawry, where special bail is required, the defendant shall put in and justify the same in manner aforesaid, instead of giving a bail-bond to the sheriff.

That the defendant may deposit in court the sum sworn to, and costs, in lieu of putting in and perfecting bail, or in exoneration thereof, according to 43 Geo. 3. c. 46. and 7 and 8 Geo. 4. c. 71.

That no foreigner, who shall not have resided in England six months at any one time, shall be liable to arrest, except for a debt contracted or a cause of action arising in England or the dominions thereof(*c*).

That no persons shall be liable to arrest, or to be taken or charged in execution, on any debt or engagement contracted during infancy, unless, after attaining the age of twenty-five years, he shall have confirmed the same by a writing attested by two witnesses.

That no woman shall be liable to arrest, attachment, or to be taken in execution.

That no person who shall have been declared a

(c) The case of a foreigner is particularly hard. On his arrival he becomes subject to our laws, and may be immediately arrested, even on an affidavit of debt made abroad, although, as a stranger, he is obviously unable to induce any persons to bail him. When he has been arrested abroad, he may be arrested here for the same cause of action, at least when it does not appear that the plaintiff may have the advantage by the proceeding abroad, as in this country.—Tidd's Practice, vol. 1. 179. And if a man becomes bankrupt, and obtains his certificate, in a foreign country, where the debt was contracted, he may be arrested here for the same debt.—2 Chit. 55. 8 T. R. 607. As likewise for a debt arising here.—1 East's Rep. 6.

lunatic shall be liable to arrest, attachment, or to be taken or charged in execution.

That no person shall be taken or charged in execution, or on any decree or attachment for the payment of money in the nature of an execution, unless the original debt shall have amounted to 50*l.* over and above all costs of suit, except upon a judgment for a bill or note for 30*l.* or upwards, or on a judgment in an action for libel, assault, battery, false imprisonment, or wilful and malicious trespass, where the damages awarded shall amount to 20*l.* over and above all costs.

That no arrest, attachment, or execution, shall be made or levied in any dwelling-house, except between the hours of eight o'clock in the morning and eight at night.

It is presumed that these or similar regulations will protect the fair interests of the creditor, and guard the debtor from the mischief and cruelty incident to the present law of arrest, especially from the difficulty of instantly procuring bail.—He will also be secured from the discretionary power of the sheriff's officer, in accepting or refusing persons as bail, in taking bribes for favour, and douceurs as necessary premiums of insurance against those heavy risks of his office, by which he is sometimes ruined.

THE END.

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